In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 813

STEWART L. UDALL, SECRETARY OF THE INTERIOR, PETITIONER

v.

JAMES K. TALLMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

We showed in the petition that not only were lease offers covering substantially the whole of the Kenai Moose Range accepted for filing prior to 1958—*i.e.*, during the period the court of appeals held the Range was "closed" to leasing—but leases covering over 133,000 acres were actually issued during that period (Pet. 10–11). Respondents dismiss that showing—and the Congressional approval of those actions (Pet. 12–14)—with the assertion, often repeated but never explained, that "all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941

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Executive Order, or were in the Swanson River Unit specifically authorized by the regulations of December 8, 1955" (Opp. 8; see also 7, 13, 15). The errors of that assertion make necessary this reply brief.

I

The Swanson River Unit to which respondents refer comprises 30 leases, covering 71,680 acres, issued in 1956[1] with the advance approval of the House Committee on Merchant Marine and Fisheries (see Pet. 13). Respondents acknowledge that those leases were within the area which they claim was closed to leasing by the 1941 Executive Order (*i.e.*, were not within the "excepted area") but seek to explain away the leasing on the ground that it was "specifically authorized by the regulations of December 8, 1955" (Opp. 8, 15). The only hint respondents give of the basis for that assertion is their statement that the 1955 regulation "expressly designated certain areas of the Kenai Moose Range (not involved in this case) as available for leasing only upon approval of a detailed operating program to protect the wildlife" (Opp. 7). That statement is true enough. Contrary to the inferences respondents seemingly invite the reader to draw, however, (a) the areas thus "expressly designated" did not include the Swanson River Unit; and (b) the regulation *restricted* rather than *authorized* leasing in the areas so "designated."

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[1] Two of the leases, covering 4,160 acres, did not become effective until January 1, 1957.

a. The only areas of the Kenai Range "expressly designated" in the 1955 regulation were (Pet. 13a):

> Kenai: The following areas and all lands within one mile of Tustemena Lake, Skilak Lake, Kenai River, Upper and Lower Russian Lake and River Hidden Lake, Kasilof River, and Chickaloon Flats.

The leases comprising the Swanson River Unit cover an area approximately 25 miles long and 5 miles wide. At the *closest* point, the boundary of those leases is 27.8 miles from Tustemena Lake, 17 miles from Skilak Lake, 12 miles from Kenai River, 36.4 miles from Upper Russian Lake, 33.8 miles from Lower Russian Lake, 19.8 miles from River Hidden Lake, 24.5 miles from Kasilof River, and 4.5 miles from Chickaloon Flats. There is not the slightest relationship, geographic or otherwise, between the Swanson River Unit leases and the areas "expressly designated" in the 1955 regulation.

b. The legal premise of respondents' argument—that the 1955 regulation "specifically authorized" leasing in the "expressly designated" areas in order to except them from a general prohibition against leasing—is as false as the factual premise. The 1955 regulation is set out in full at Pet. 11a–13a. After forbidding leasing in certain wildlife areas not material here, the regulation provided (§ 192.9(b)(1)):

> Oil and gas leases may be issued for other lands administered by the Fish and Wildlife Service for wildlife conservation, except that * * * [in areas in which leasing] might seriously impair or destroy the usefulness of the lands for wild-

> life conservation purposes, no leases will be issued unless a complete and detailed operating program for the area, which will insure full protection of the particular values for which established, is approved by the Director, Fish and Wildlife Service. * * *

The areas in which it had been determined that leasing "might seriously impair or destroy" wildlife uses were listed in an Appendix B, and it is there that the areas of the Kenai Range mentioned above (Tustemena Lake, *etc.*) were "expressly designated." By the very terms of the regulation, therefore, those areas were designated, not to authorize leasing in them, but to "except" them from the category of lands in which "leases may be issued" without limitation and to subject their leasing to special restrictions.

Far from "specifically authorizing" leasing in the "designated" areas despite the alleged "closing" of the Range by the 1941 Executive Order, what the 1955 regulation did was to make express the Department's view that the Range had never been closed. The provision that "leases may be issued for other lands administered by the Fish and Wildlife Service for conservation purposes" literally included the Kenai Moose Range, and the specific exception of a part of the Range from that provision confirmed that meaning by necessary implication. In thus treating the entire Range as an area in which "leases may be issued" subject only to the designated restrictions, the regulation was necessarily premised upon a construction of

the 1941 Order as not barring mineral leasing.[2] It was on that premise, not by virtue of some "special" authority (Opp. 15), that the Swanson River Unit was leased.

II

Respondents state that, with the exception of the Swanson River Unit, "all of the lands for which leases were granted prior to 1958 were in the excepted area of the Range expressly left open by the terms of the 1941 Executive Order" (Opp. 8, 13, 15). With some exceptions which respondents perhaps understandably overlooked,[3] the statement is literally true. In this instance, the error is that of omission. The omitted but crucial fact is that most of the area originally excepted from the 1941 Executive Order was later "withdrawn from settlement, location, sale or entry" by a Public Land Order issued in 1948 (Order No. 487, Pet. 10a; see Pet. 8, n. 8). Respondents contend, and the court of appeals held, that the 1948 Order had the same effect in "closing" to leasing the area to which it applied as the 1941 Order had in the area originally withdrawn (see Opp. 5, n. 5). Respondent Coyle's claim, indeed, is wholly dependent

[2] The 1955 regulation thus also squarely contradicts respondents' assertion that "none of the orders and regulations * * * [prior to 1958] gave any indication that the bulk of the lands in the Range * * * were open to oil and gas leasing" (Opp. 13).

[3] Between October 1953 and November 1955, six leases were issued which included 3,306 acres within the area withdrawn by the 1941 Executive Order but not within the Swanson River Unit. Those leases do not, however, appear on the map prepared by the oil companies from which respondents apparently drew their information (Opp. 8).

upon that proposition (see Pet. 8, n. 8). Thus the leases issued prior to 1958 in the area governed by the 1948 Order, on applications filed while that Order was outstanding,[4] are fully as significant as those issued in the area governed by the 1941 Order: both demonstrate a consistent administrative practice directly opposed to the respondents' view of the effect of such withdrawal orders.[5]

III

Respondents' "explanation" of the leasing practice is not only specious but incomplete, for it treats only with the leases actually issued prior to 1958. To an equally significant part of that practice their only answer is silence: namely, the acceptance for filing and initial processing, prior to 1958, of lease *applications* covering substantially the whole of the northern half of the Range. As explained in the petition (Pet. 11, 2a–6a), final action on most of those applications was

[4] There were 25 leases covering 42,119 acres in that category. Although Public Land Order No. 487 was revoked on September 9, 1955, by Public Land Order No. 1212 (see Pet. 10a and footnote), the applications for those 25 leases were all filed (in July 1954 through February 1955), and two of the leases were actually issued (in May and July 1955), prior to the revocation.

[5] As respondents point out (Opp. 5–6), there was a small portion of the Range (the upper left-hand corner on the map appended to the brief in opposition) that was both excepted from the withdrawal provisions of the 1941 Order and not covered by the 1948 Order. We agree that the leases issued in that area (seven leases covering 15,961 acres) are not material and should not have been included in our statistics. The relevant pre-1958 leases are the 36 leases covering 74,986 acres in the area withdrawn by the 1941 Order and the 25 leases covering 42,119 acres in the area withdrawn by the 1948 Order, making a total of some 117,000 acres, rather than the figure of 133,000 given in the petition (Pet. 10–11).

withheld pending a reexamination of the wildlife-refuge leasing policy and a revision of the regulation accordingly. When, with the adoption of the 1958 version of the regulation and its implementing order of August 2, 1958, the policy questions were finally resolved, those previously-suspended applications were promptly acted upon and 366 leases covering an additional 784,000 acres of Range land were issued.* Although its validity is the very issue in this case, that action—expressly contemplated by the 1958 regulation and order (Pet. 5a–6a)—is itself incontestable proof of the extensive practical implementation of the Secretary's interpretation of the withdrawal orders as not barring mineral leasing. The action of the Department in leasing substantially the whole of the Range left open by the 1958 order on the basis of pre-1958 applications does not lose its legal significance by being ignored by respondents.

IV

Despite the fact that substantially *all* of the leases issued in the Range (covering over 900,000 acres) were issued on applications filed prior to 1958, respondents assert that the court of appeals' holding that a lease so issued is a "nullity" does not present an important question. The only reason given is that,

* Those figures include a small area of the Range that is technically irrelevant. See note 5, *supra*, and the map appended to the brief in opposition.

since none of the other top-filers[7] appear to have preserved their rights—which is in itself, we suggest, some indication of the insubstantiality of the claim—there is a "question" whether the validity of the other leases could be attacked, either by private persons or by the Secretary *sua sponte* (Opp. 21–22).

Whether any private persons could find a way to challenge the other leases can only be a matter of speculation; not even respondents claim that the "questions" that might be raised have been finally settled. The only authority cited by respondents is the statute requiring suits challenging leasing actions to be brought within 90 days of the final decision of the Secretary (30 U.S.C. 226–2; Opp. 21). The decision below, however, shows what small comfort that provision gives lessees: after more than 90 days had already elapsed from an otherwise final decision by the Secretary, the respondents successfully managed to reinstate their right to bring suit simply by filing with the Secretary an extraordinary "Petition for Exercise of Supervisory Authority" (J.A. 41; Pet. 28a–31a). Nor does that provision prevent anyone from filing a new application and then seeking a time-

[7] Initially, respondents pretend to ignorance whether there *were* conflicting applications on file when the other leases were issued (Opp. 21). In the drawing held among the applications "simultaneously" filed in August 1958 (see Pet. 6a and notes), the respondents' applications ranged between the 6th and the 179th drawn, yet were the first to cover the land in suit, demonstrating that the other applications (listed at J.A. 19–24) were on many other parts of the Range. The subsequent leasing of substantially the whole of the Range on offers filed prior to 1958 was therefore necessarily in the face of conflicting offers filed at the same time as respondents'.

ly review of its rejection. While it is our view that an applicant for already-leased lands may not challenge the validity of the existing leases, our certainty of that is no greater than was our certainty that respondents could not prevail in this action—particularly if such a case arose in the court below and were seen by it as an effort to force an intransigent Secretary to "comply" with its decision in this case. And due recognition for the ingenuity of counsel dictates caution in assuming that no other forms of attack by private persons could be found.[8]

Whatever the possibilities for private actions, we share none of respondents' doubts about the power of the Secretary *sua sponte* to cancel invalidly-issued leases. And if the decision below holding such leases to be invalid were allowed to become final, the Secretary would be hard-pressed to justify—against the predictable charges of making a "give-away" to the "oil companies"[9]—setting his view of the law against the courts' and refusing to take any action to set aside leases on valuable oil lands which, according to a solemn judgment of the court of appeals

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[8] What of an action, for example, by a homestead patentee of lands subject to such "invalid" leases?

[9] A kind of emotional appeal not unlike that made by respondents in their repeated reference to the Griffin applicants as "representatives of the oil companies" (Opp. 2, 3, 6, 11–12, 14). In fact, of course, the Griffin group had no relationship to the oil companies when they filed their applications but thereafter did just what respondents would have done had they gotten the leases—namely, sell the leases or working interests to a company with sufficient resources to develop them, retaining an overriding royalty. And since the original applicants still have a royalty interest, the oil companies are not even now the only parties in interest.

which this Court declined to review, were mere "nullities."

The short of it, however, is that it is simply no answer to our claim of importance to say that, in litigation involving the other leases, the lessees "may" be able to raise other "questions" and might ultimately prevail. The urgent need for review by this Court arises, not merely from the ultimate impact of the rule announced by the decision below, but from the immediate impact of the doubt created by it in disrupting the orderly development of the oil and gas resources of the Kenai Range and in threatening to precipitate extensive and, in our view, wholly needless litigation (see Pet. 6–7). In short, respondents' answer (that the other lessees "may" have additional defenses) gives the existing lessees merely a law suit, not the security of title needed to warrant their expenditure of large sums of money on further development.

CONCLUSION

On nothing more than a disagreement with the Secretary over the abstract meaning of words—words which the Secretary himself had power to change—the court of appeals has declared invalid substantially the entire course of action followed by the Department over many years in the leasing of the Kenai Moose Range. The decision casts in doubt the ownership of leases covering over 900,000 acres of land on which extensive development has taken place and major oil discoveries have been made. The resulting confusion

and uncertainty, which threatens to halt further development in the meantime, can be finally resolved only by this Court. The petition for certiorari should be granted.

Respectfully submitted.

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